UIC Law Review

Volume 2 | Issue 2 Article 6

Spring 1969

Military Justice and Due Process: Concerning the Rights of Representation and Judicial Review - An Analysis of Kennedy v. Commandant and Application of Stapley, 2 J. Marshall J. of Prac. & Proc. 326 (1969)

Richard J. Loeffler

MILITARY JUSTICE AND DUE PROCESS: CONCERNING THE RIGHTS OF REPRESENTATION AND JUDICIAL REVIEW — AN ANALYSIS OF *KENNEDY V. COMMANDANT* AND *APPLICATION OF STAPLEY*

INTRODUCTION

Controversy presently exists about the right to legal representation afforded the military accused tried at special court-martial.[1] The conflict has recently been highlighted by two federal district court decisions, *Kennedy* v. *Commandant* and *Application of Stapley*,[2] which resulted in conflicting views as to the military accused's right to counsel before special court-martial. The major issue raised in both cases was whether the sixth amendment guarantee of the assistance of counsel applied to military personnel tried before special court-martial.[3]

---

[1] The Uniform Code of Military Justice (hereinafter cited as the UCMJ) provides for courts-martial jurisdiction in three tribunals: general, special and summary courts-martial. *See generally* 10 U.S.C. §§816-21 (1964). The general court-martial has jurisdiction for any offense punishable under the UCMJ, as prescribed by the President, to adjudge any punishment including death where specifically authorized.

On the other hand, the jurisdiction of a special court-martial encompasses all noncapital offenses and those capital offenses as prescribed by the President. Special courts-martial may impose any punishment except death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, or forfeitures in pay for various periods of time. A bad-conduct discharge may be imposed, provided certain qualifications are satisfied.

Similarly, a summary court-martial may adjudicate any noncapital offense over all persons, except officers, cadets and midshipmen. If the accused objects to trial before summary court-martial, proceedings may be ordered before special or general courts-martial. Any punishment may be imposed by summary courts-martial except death, dismissal, dishonorable or bad-conduct discharges, confinement for more than one month, hard labor for more than 45 days, or other forfeiture sanctions.

The foregoing grant of courts-martial jurisdiction is made to each branch of the armed forces, to be exercised over those persons subject to the UCMJ, 10 U.S.C. §§802-03 (1964), but does not foreclose the operation of military commissions, provost courts or other military tribunals of concurrent jurisdiction. With regard to persons amenable to prosecution at military courts-martial, this question has long plagued the federal courts, especially concerning civilian personnel who were employed at overseas installations or dependents who accompanied servicemen. *See, e.g.*, Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1956); United States v. McElroy, 158 F. Supp. 171 (D.D.C. 1958), *rev'd* 361 U.S. 281 (1960).

[2] Kennedy v. Commandant, 258 F. Supp. 967 (D. Kan. 1966), *aff'd* 377 F.2d 339 (10th Cir. 1967); Application of Stapley, 246 F. Supp. 316 (D. Utah 1965).

[3] U.S. CONST. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Factually, the cases were quite similar. Petitioners, by habeas corpus, sought collateral review[4] of special court-martial proceedings after their requests for appointment of legally trained counsel had been refused. Since neither defendant could afford civilian counsel,[5] defense counsel untrained in law had been appointed pursuant to Article 27(c) of the Uniform Code of Military Justice[6] which provided in relevant part:

> (c) In the case of a special court-martial —
>
> (1) if the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel detailed by the convening authority must be a person similarly qualified; and
>
> (2) if the trial counsel is a judge advocate, or a law specialist, or a member of the bar of a Federal court or the highest court of a State, the defense counsel detailed by the convening authority must be one of the foregoing.[7]

---

[4] Military adjudications are not subject to direct review by the federal civilian courts. The only significant remedy is the indirect attack of military judicial proceedings in the federal courts by means of habeas corpus petition. Burns v. Wilson, 346 U.S. 137 (1953); Hiatt v. Brown, 339 U.S. 103 (1950); *In re* Grimley, 137 U.S. 147 (1890); Note: *The Supreme Court, 1952 Term*, 67 HARV. L. REV. 91 (1953). Once a military defendant has exhausted all available military remedies, *see* authority cited at note 83 *infra*, his only relief from physical punishment or confinement would be a petition for the extraordinary writ, due to the absence of direct review of courts-martial. Wurfel, *Military Habeas Corpus*, 49 MICH. L. REV. 493 (1951).

Collateral attack of military decisions is possible by using other extraordinary remedies. For example, Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965), allowed the use of mandamus to a serviceman to compel the Secretary of Defense to cause reconsideration of a petition for the correction of a dishonorable discharge, on finding that the serviceman's sentence was invalid due to constitutional violations. The final method would be a proceeding for pecuniary relief before the Court of Claims where a serviceman seeks recovery for lost pay that resulted from a court-martial punishment. *See, e.g.*, Shaw v. United States, 357 F.2d 949 (Ct. Cl. 1966); Shapiro v. United States, 69 F. Supp, 205 (Ct. Cl. 1947).

[5] Due to the provisions of the UCMJ, the probabilities are slight that an indigency situation would ever arise at courts-martial. Interestingly enough, in *Kennedy*, the indigency of the accused resulted from a deduction in pay as punishment meted out by a prior special court-martial. 258 F. Supp. at 968.

The reason for the scarcity of indigency problems is because of the statutory language found in 10 U.S.C. §838(b) (1964):

> The accused has the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available, or by the defense counsel detailed under section 827 of this title (article 27). Should the accused have counsel of his own selection, the defense counsel, and assistant defense counsel, if any, who were detailed, shall, if the accused so desires, act as his associate counsel; otherwise they shall be excused by the president of the court.

[6] Military Justice Act, Pub. L. No. 90-632, §827 (October 24, 1968), which added the following paragraph to the present section:

> The accused shall be afforded the opportunity to be represented at the trial by counsel having the qualifications prescribed under section 827(b) of this title (article 27(b)) unless counsel having such qualifications cannot be obtained on account of physical conditions or military exigencies. If counsel having such qualifications cannot be obtained, the court may be convened and the trial held but the convening authority shall make a detailed written statement, to be appended to the record, stating why counsel with such qualifications could not be obtained.

[7] 10 U.S.C. §827(c) (1964). In contrast, the qualifications of counsel

Thus, if a trial counsel was a legally trained individual, then defense counsel had to be similarly trained. On the other hand, Article 27 was satisfied when both the adversaries were merely commissioned officers, with non-legal backgrounds.[8]

Both *Kennedy* and *Stapley* disagreed over the scope of collateral review by habeas corpus. As viewed by the *Kennedy* court, a finding that the special court-martial had acted within the proper scope of its jurisdiction prohibited further examination by the reviewing court.[9] However, the *Stapley* court acknowledged the need for a broader scope of collateral review to vindicate constitutional rights and further held that:

> Notwithstanding the limited scope of such jurisdiction, the vindication of constitutional rights through such inquiry and rulings in proper cases transcends ordinary limitations and affords federal courts both the jurisdiction and the duty to inquire and rule upon the legality of detainment of any person entitled to constitutional protections whether in or out of military service.[10]

The two decisions also differed both in their holdings as to the right to counsel and the respective reasoning employed to support their conclusions. *Kennedy* held that a military accused was not entitled to representation by legally trained counsel. The procedural rights of the accused were considered to be part of the constitutional power of Congress "to make Rules for the Government and Regulation of the land and naval Forces."[11] The *Kennedy* court recognized that "military due process" paralleled many of the protections "given civilian defendants by the Bill of Rights,"[12] but nevertheless the court held that this concept of "military due process" was of legislative origin pursuant to the grant of congressional power under article I, rather than from the fifth and sixth amendments.[13] Implicit in this holding is the view that article I of the Constitution authorized the implementation of a separate legal system solely applicable to the military community.

---

before a general court-martial contain those minimum standards of representation established before civilian courts. Article 27(b) requires that, at a minimum, counsel at general court-martial must have graduated from an accredited law school and received certification to practice from the Judge Advocate General, 10 U.S.C. §827(b) (1964).

[8] The former situation is expressly stated in sub-section (2) of Article 27(c). The latter case of non-legally trained counsel comes from subsection (1) providing for defense counsel being "similarly qualified" to that of trial counsel. *See* text at note 7 *supra.*

[9] 258 F. Supp. at 970. However, *Kennedy's* limited review of the military tribunals jurisdiction was modified in subsequent affirmance by the court of appeals in Kennedy v. Commandant, 377 F.2d 339, 342 (10th Cir. 1967), to harmonize with the *Stapley* view.

[10] 246 F. Supp. at 320.

[11] U.S. CONST. art. I, §8, cl. 14. From this constitutional foundation the UCMJ was created to facilitate congressional control over the armed forces.

[12] 258 F. Supp. at 970.

[13] *Id.*

On the other hand, *Stapley* concluded that a defendant in a special court-martial proceeding is entitled to legally trained counsel for the reason that the concept of "military due process" must satisfy the standards of the sixth amendment, particularly with respect to the right to counsel. Thus, it would appear that while *Stapley* recognized the existence of the aforementioned article I power,[14] the court held that article I cannot be construed to remove the process of military justice from the demands of the Bill of Rights.[15] Therefore, according to *Stapley,* an act of Congress (referring to the UCMJ) cannot be determinative of such rights without also satisfying the sixth amendment.[16]

The *Kennedy* and *Stapley* courts further differed in their respective treatment of military necessity, an argument which urges that military discipline must be preserved regardless of any deleterious effect upon an individual's rights. This difference is consistent with their divergence regarding the extent to which the article I power is subject to due process restraints. The *Kennedy* court emphasized the factor of military necessity and the need for discipline and duty[17] as the countervailing consideration to be balanced against the rights of the military accused. This argument was severely criticized by the *Stapley* court on factual as well as constitutional grounds. The *Stapley* court reasoned that in light of the increasing influence of the armed forces over greater numbers, it was "no longer either reasonable or necessary, if it ever were, to deem *any officer* qualified to act as defense counsel . . . nor . . . to limit the availability of qualified defense counsel to cases in which the prosecution is represented by qualified counsel."[18] The *Stapley* court then concluded that military necessity was a factor which alone was never dispositive of the rights of an accused.[19] The *Stapley* decision, unlike *Kennedy,* also took notice of the type of crime charged[20] which here would have been a felony if prosecuted in a civilian court. Furthermore, Judge Christensen expressed concern over the possibility of a bad-conduct discharge of the military defendant,[21] after one or more trials with repeated constitutional violations, where as a result, a person's civilian livelihood might suffer under the onus of such punishment. This concern regarding bad-conduct discharges has been ameliorated to some extent by recent

[14] 246 F. Supp. at 322. More generally, the court concluded that "military due process" had to comport with minimal requirements of constitutional due process. *Id.* at 321.

[15] 246 F. Supp. at 318, 320.

[16] *Id.* at 322.

[17] 258 F. Supp. at 969.

[18] 246 F. Supp. at 321 (emphasis added).

[19] *Id.* at 320.

[20] *Id.* at 318.

[21] *Id.* at 321.

amendment of the UCMJ.[22] *Stapley* thus concluded that the appointment of a non-lawyer as the accused's defense counsel did not satisfy the sixth amendment and that the special court-martial was "a mere mockery or sham."[23]

The foregoing analysis of the *Kennedy* and *Stapley* decisions exemplifies the unsettled question of the applicability of the constitutional guarantee of counsel before a special court-martial. More generally, the cases illustrate the necessity of inquiry into basic considerations of "fairness" in military trials, due to a growing concern with protecting an individual's rights in all judicial tribunals.

HISTORICAL DEVELOPMENT

The divergence of *Kennedy* and *Stapley* concerns the reviewability of a military judicial proceeding by the federal judiciary and the applicability of the article I power upon the military accused's right to counsel before a special court-martial. As will be demonstrated, both of these issues are premised upon a common philosophy and perspective.[24]

Scope of Habeas Corpus Review

The division of the federal courts as to the scope of habeas corpus review available to a military defendant centers upon the interpretation of the jurisdiction prerequisite as a ground for granting the writ.[25] In the early and leading case of *In re Grimley*,[26] the petitioner, having been convicted of desertion, contended that the military court had lacked jurisdiction over the person because at the time of enlistment he had been over the maximum enlistment age. Rejecting this argument, the Supreme Court stated that petitioner's age was not material to the contractual

---

[22] Rectification of the onus caused by a bad-conduct discharge, as expressed by Judge Christensen, was partially accomplished by recent amendment of section 819 of the UCMJ which now reads in part:

> A bad conduct discharge may not be adjudged unless a complete record of the proceedings and testimony has been made, counsel having the qualifications prescribed under section 827(b) . . . was detailed to represent the accused. . . .

Military Justice Act, Pub. L. No. 90-632, §819 (October 24, 1968). Thus, a condition precedent to a bad-conduct discharge has been imposed. However, the remedy is only partially effective since intervening special courts-martial usually affect the accused before reaching the point where bad-conduct punishment may be pronounced. In these intervening proceedings the denial of qualified counsel may operate to the disadvantage of the accused, where he eventually may receive a bad-conduct discharge.

[23] 246 F. Supp. at 320.

[24] *See* text beginning at note 70 *infra.*

[25] *See* Bishop, *Civilian Judges & Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40 (1961), which calls for similar treatment in the scope of habeas corpus review afforded to petitioners from federal, state or military proceedings. Thus, strict consideration of jurisdiction becomes displaced by concern for constitutional "fair trial," regardless of military exigencies.

[26] 137 U.S. 147 (1890).

obligation and status he assumed at the time of his enlistment, and held:

> [C]ivil courts may in any case inquire into the jurisdiction of a court-martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence. . . . [I]t is equally clear that by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceeding of a court-martial; and that no mere errors in their proceedings are open to consideration. The single inquiry, the test, is jurisdiction.[27]

The early federal decisions following *Grimley* have emphasized this restrictive language. From this developed the position that in collateral review of military proceedings, the inquiry of the habeas court is limited solely to the determination of the power of the military tribunal to act over the person.[28]

Under this "strict" view, those "mere errors" referred to in *Grimley* would preclude questions of constitutional due process from collateral review. Thus, in *In re Yamashita*,[29] an enemy officer, convicted before a military commission, sought collateral review which questioned that tribunal's procedures with regard to restrictions over his defense of the charges. The Supreme Court refused to consider the fairness of military proceedings where allegations of inadequate procedural safeguards were presented. Moreover, even where such procedural safeguards were required by statute, the failure of the military tribunal to comply has been held to be outside the scope of jurisdiction for habeas corpus review.[30] Thus, for example, allegations of inadequate pretrial investigation in general court-martial prosecutions[31] have been held not determinative of a military court's jurisdiction,[32] either because not essential to an exercise of jurisdiction[33] or because the facts alleged did not show deprivation of the court's power

---

[27] *Id.* at 150.

[28] *See In re* Yamashita, 327 U.S. 1 (1946); Collins v. McDonald, 258 U.S. 416 (1922); Johnson v. Sayre, 158 U.S. 109 (1895); Johnson v. Biddle, 12 F.2d 366 (8th Cir. 1926); *Ex parte* Dostal, 243 F. 664 (N.D. Ohio 1917); *Ex parte* Tucker, 212 F. 569 (D. Mass. 1913); LaRose v. Young, 139 F. Supp. 516 (N.D. Cal. 1956); Jackson v. Sanford, 79 F. Supp. 74 (N.D. Ga.), *aff'd* 163 F.2d 875 (5th Cir. 1947); Lewis v. Sanford, 79 F. Supp. 77 (N.D. Ga. 1948); *Ex parte* Steele, 79 F. Supp. 428 (M.D. Pa. 1948); Adams v. Hiatt, 79 F. Supp. 433 (M.D. Pa. 1948), *cert. denied* 337 U.S. 946 (1949).

Recently, the "strict" view was reaffirmed in a decision dealing with substantive law, Whelchel v. McDonald, 340 U.S. 122 (1950).

[29] 327 U.S. 1 (1956).

[30] *See, e.g.*, Burns v. Wilson, 346 U.S. 137 (1953); Hiatt v. Brown, 339 U.S. 103 (1950).

[31] 10 U.S.C. §832 (1964) (formerly Article of War 70).

[32] Humphrey v. Smith, 336 U.S. 695 (1949).

[33] "The pretrial requirements of Article 70 [10 U.S.C. §832 (1964)] are directory, not mandatory, and in no way affect the jurisdiction of a court-martial." *Id.* at 699. The dissenting opinion argued that without the sanction of a federal court's habeas corpus inquiry to enforce pretrial investigations in military proceedings, the majority relieved this procedure from its mandatory character contrary to the military's own interpretation and rendered the provision's effect as meaningless.

to adjudicate.[34] Similarly, in *Hiatt* v. *Brown*,[35] general court-martial jurisdiction over a military accused tried for murder was upheld by the United States Supreme Court despite the fact that a member of the Judge Advocate General's staff, who had been detailed to the tribunal, was absent from the trial on verbal orders of the commanding general who had convened the court. Jurisdiction was sustained since no abuse of the convening authority's discretion was shown where the presence of a law member upon the court was conditioned upon the availability of such personnel.[36]

This narrow approach to the scope of habeas corpus review in military proceedings is consistent with and may well be predicated upon an underlying philosophy which would promote the existence of mutually exclusive judicial systems for the military and civilian communities. This underlying attitude is revealed more overtly in the opinion rendered in *Le Ballister* v. *Warden*[37] by Judge Stanley, who also wrote the *Kennedy* decision:

> Because of the peculiar relationship between military and civil law, the scope of matters open for review in habeas corpus proceedings brought by a military prisoner is limited. Sentences of court-martial, affirmed by [military] reviewing authority, may be reviewed 'only when void because of an absolute want of power, and are not merely voidable because of the defective exercise of power possessed.'[38]

As a consequence of this separatism and abstention policy under the "strict" scope of habeas corpus review, the federal courts manifest a reluctance to enlarge the definition of jurisdiction for the purpose of habeas corpus review in military proceedings.

The "strict" scope of habeas corpus review of military decisions is to be contrasted to the standard applied in civilian cases. In the civilian area, the boundaries of the jurisdictional ground for habeas corpus review was radically extended by the Supreme Court in *Johnson* v. *Zerbst*.[39] The case involved a conviction for counterfeiting where no counsel had been provided for the defendant. The Court looked beyond the narrow concept of a court's power to act,[40] and held that "compliance with this con-

---

[34] *See* Henry v. Hodges, 171 F.2d 401 (2d Cir. 1948), *cert. denied*, 336 U.S. 968 (1949). *But cf.* Hicks v. Hiatt, 64 F. Supp. 238 (M.D. Pa. 1946).

[35] 339 U.S. 103 (1950).

[36] *See* text beginning at note 88 *infra*.

[37] 247 F. Supp. 349 (D. Kan. 1965).

[38] *Id.* at 352.

[39] 304 U.S. 458 (1938).

[40] *Id.* at 465. Regarding the protection of an accused's right as a court's duty under habeas corpus, the Court stated:

> '[I]t results that . . . a prisoner in custody . . . may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the . . . court to proceed to a judg-

stitutional mandate is an essential jurisdictional prerequisite."[41] It held that a court might be deemed to lose jurisdiction "in the course of proceedings" by disregarding the fundamental right to counsel,[42] and thus provide a basis for habeas corpus review.[43]

In effect, *Zerbst* redefined the conceptual boundaries of jurisdiction to encompass matters of procedural due process, and as a result broadened the scope of habeas corpus review. When this theory is considered with the Supreme Court's recognition that the right to counsel is so fundamental in character that denial of representation to an accused is violative of due process,[44] then the remedy of habeas corpus is warranted even where the trial court had jurisdiction at all times to proceed to conviction. The Supreme Court recently reinforced this proposition in *Fay* v. *Noia*:

> The course of decisions . . . makes plain that restraints contrary to our fundamental law, the Constitution, may be challenged on federal habeas corpus even though imposed pursuant to the conviction of a federal court of competent jurisdiction.
>
> . . . .
>
> . . . It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void.[45]

---

ment against him. . . .'
Id. at 466. *See* Frank v. Mangum, 237 U.S. 309, 346 (1915) (dissenting opinion).

[41] 304 U.S. 458, 467 (1938).

[42] *Id.* at 468.

[43] The *Zerbst* standard of federal habeas corpus made constitutional deprivations a jurisdictional matter. This has been criticized as a "fiction" of the Supreme Court in order to provide a new remedy. Note, *State Criminal Procedure and Federal Habeas Corpus*, 80 HARV. L. REV. 422, 427 (1966).

The *Zerbst* interpretation is subject to further criticism because one of the grounds for a federal court's issuance of a writ of habeas corpus was "where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States. . . ." Act of February 5, 1867, ch. 28, 14 Stat. 385. This same ground for granting the writ has remained, as now expressed in 28 U.S.C. §2241(c) (3) (1964).

Despite this provision, the federal judiciary persisted in placing habeas corpus on jurisdictional grounds, when presented with allegations of constitutional deprivation. *See, e.g.*, Frank v. Mangum, 237 U.S. 309 (1915); Felts v. Murphy, 201 U.S. 123 (1905); *Ex parte* Bigelow, 113 U.S. 328 (1885). Yet, the *Zerbst* case decisively established the jurisdictional nature of constitutional grounds for habeas corpus, without regarding the existence of the statutory authority for issuance of habeas corpus solely upon allegations of a constitutional violation. This preoccupation with jurisdictional findings in order to allow habeas corpus issuance is probably due to common law principles, but would seem unjustified in view of the statutory provision discussed above.

Significantly, the same 1867 statute contained a proscription as to the issuance of habeas corpus for any person in custody of military authority if charged with a military offense or a participant in rebellion against the government. However, this denial of habeas corpus to military accused was conspicuously absent from subsequent codifications of this statute, most importantly in the codification which occurred six years after the enactment of 1867. Revised Statutes ch. 13 (1873-74).

[44] Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932). *Compare* Frank v. Mangum, 237 U.S. 309 (1915), *with* Moore v. Dempsey, 261 U.S. 86 (1923).

[45] 372 U.S. 391, 409, 423 (1962).

Although the "liberal" view, postulated by *Zerbst* and followed by subsequent cases, dealt exclusively with habeas corpus review of federal civilian prosecutions, the extension of such "liberal" collateral review to military decisions has been suggested.[46] A number of relatively recent federal decisions have extended the basis of collateral review of military adjudications, most significantly when considering a military prisoner's petition for habeas corpus alleging the denial of civilian due process.[47] Indeed, one court has expressly interpreted the *Zerbst* standard as a mandate to be followed by the federal court hearing military habeas corpus proceedings:

> [T]he defects [constitutional due process violations] pointed out above are . . . too serious to be ignored. . . . Whether failure to do the things required be construed as a defect precluding the acquiring of jurisdiction or whether the failure be held to deprive the accused of the due process contemplated by the organic law, the result is the same. Relief should be granted by a court of general jurisdiction, charged with the responsibility of inquiring into the legality of the detention of the accused.[48]

This approach emphasized the *right* of any person to the extraordinary writ where constitutional violations were alleged, and disregarded the type of court which sentenced the prisoner.[49]

Thus, the "liberal" view of habeas corpus review of military decisions demands the application of civilian criteria to the jurisdictional prerequisite, while the "strict" view would interpret that jurisdictional ground in a narrow context. This apparent split with regard to the availability of habeas corpus is representative of a more major division as to the applicability of due process procedural safeguards that are generally available, since a prerequisite for enforcing these due process standards would be the extent of reviewability by civilian courts. Due to the fact that habeas corpus is the only available avenue of review of military proceedings, this represents the exclusive means by which civilian courts may intervene in these proceedings. As will be discussed below, this division, which may be characterized as embodying a liberal or conservative view, centers around basic protections given by article I of the Constitution to military

[46] 13 U.C.L.A. L. REV. 1419 (1966), where the author feels that the *Burns* (*see* note 70 *infra*) case concern for fair treatment by military courts implies the application of the *Zerbst* standard. *Contra*, Comment, *Constitutional Rights of Servicemen Before Courts-Martial*, 64 COLUM. L. REV. 127 (1964).

[47] United States *ex rel.* Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944); Schita v. King, 133 F.2d 283 (8th Cir. 1943); Anthony v. Hunter, 71 F. Supp. 823 (D. Kan. 1947); *Ex parte* Benton, 63 F. Supp. 808 (N.D. Cal. 1945).

The "liberal" view was also expressed in the affirmance of Kennedy v. Commandant, 377 F.2d 339 (10th Cir. 1967). *See also* Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947) (non-habeas corpus proceeding).

[48] Anthony v. Hunter, 71 F. Supp. 823, 831 (D. Kan. 1947).

[49] *Id.* at 828.

procedure to maintain the insularity of military justice.

Origins of the Right to Counsel in Military Proceedings

The underlying controversy regarding the extent to which article I sanctions the theory of a separate military system for that community, would even more saliently account for the division between *Kennedy* and *Stapley* with respect to the military accused's right to counsel. Perhaps this controversy may be postulated in terms as the countervailing forces of article I and the sixth amendment.[50] The view which would limit the procedural rights of a military defendant as compared to his civilian counterpart, would be giving ascendancy to the autonomous nature of military procedure under article I,[51] while the more liberal jurisdiction would give greater impact to the Bill of Rights.[52]

A. Congressional Power as the Source

Early justification for establishing control over military procedures by the article I power of Congress was evidenced in *Dynes* v. *Hoover*,[53] where the Supreme Court characterized article I as providing Congress with an independent power:

> These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and that the power to do so is given *without any connection between it and the 3d article of the Constitution* defining the judicial power of the United States; indeed, that *the two powers are entirely independent of each other*.[54]

---

[50] *Compare* Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957), *with* Wiener, *Courts-Martial & The Bill of Rights: The Original Practice*, 72 HARV. L. REV. 1 (1958).

[51] This approach is strengthened by the fact that the common law of England denied the right to counsel to a military accused and adherence to English precedent in situations dealing with analogous fundamental rights, such as trial by jury, which was also unavailable to military defendants in England. For a more thorough discussion see Avins, *Accused's Right to Defense Counsel Before a Military Court*, 42 U. DET. L. J. 21 (1964). *See Ex parte* Quirin, 317 U.S. 1 (1942); United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).

[52] Proponents of this approach would contend that since grand jury indictment in military proceedings is expressly excepted by the fifth amendment, trial by jury is impliedly denied to military personnel by the sixth amendment, and a literal interpretation of the sixth amendment neither expressly nor impliedly excepts the right to counsel from a military defendant. Therefore, it is argued that the right is granted by the Constitution. Thus, the right to counsel at military trials is suggested from a literal perusal of the Bill of Rights which leads to the principle that the guarantees of both the fifth and sixth amendments apply to the military proceeding unless expressly or impliedly excepted therein. *See* Reid v. Covert, 354 U.S. 1 (1957); United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954); United States v. Sutton, 3 U.S.C.M.A. 220, 11 C.M.R. 220 (1953) (dissenting opinion); 13 U.C.L.A. L. REV. 1419 (1966).

[53] 61 U.S. (20 How.) 65 (1857).

[54] *Id.* at 79 (emphasis added). The Court also took cognizance of the President's constitutional role as commander-in-chief, a point not heavily relied upon by legal theoreticians who espouse the article I theory.

Thus, the Court held the power of Congress to regulate military trials[55] and rights of military accused to be autonomous. The effect of this holding was the recognition of a separate jurisprudence for the military, apart from the civilian courts, with a consequent approval by the *Dynes* court of a "strict" theory of collateral review by civilian courts.[56]

The congressional power theory has not prevented its adherents from substantially improving the position of the military defendant by means of progressive legislation.[57] England's military practice had changed from a position totally denying military defense counsel to a position allowing representation, but with counsel restricted to an advisory capacity with no oral communication permitted in court.[58] The United States practice, at first closely paralleling English military jurisprudence, evolved into a position of treating military defense counsel as a privilege granted at the court-martial's discretion.[59] Subsequent legislative enactments under article I have, with respect to general courts-martial, transformed this privilege into a *right* to counsel.[60] However, the right to counsel in proceedings

---

[55] *Id.* at 82.

[56] *Id.* at 80. However, Dynes' action was one of false imprisonment in contending that the court-martial's partial verdict of guilty for attempted desertion upon a charge of desertion divested the court-martial of jurisdiction. Such collateral review is similar to that of habeas corpus.

Further, the doctrine of separate judicial systems has caused one court to assert the existence of a "different level" of justice within the military and civilian communities. Thus, it was contended that different rights, both procedural and substantive, were justified by the article I source. United States v. Sutton, 3 U.S.C.M.A. 220, 11 C.M.R. 220 (1953). For criticism of this theory and military justice in general, *see* Reid v. Covert, 354 U.S. 1 (1956); Burns v. Wilson, 346 U.S. 137, 142 (1953).

[57] *See* authority cited at notes 60-61 *infra.*

[58] W. WINTHROP, MILITARY LAW & PRECEDENTS 166-67 (2d ed. reprint 1920). *See* Wilson, *The Right of the Accused to Effective Counsel: The Military View*, 14 KAN. L. REV. 593 (1964).

[59] W. WINTHROP, MILITARY LAW & PRECEDENTS 165 (2d ed. reprint 1920).

[60] The statutory provisions of 1920 illustrate a total lack of qualifying language as to the requirement of counsel before general or special courts-martial:

> For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and for each general court-martial one or more assistant trial judge advocates and one or more assistant defense counsel when necessary: *Provided, however*, That no officer who has acted as member, trial judge advocate, assistant trial judge advocate, defense counsel, or assistant defense counsel in any case shall subsequently act as staff judge advocate to the reviewing or confirming authority upon the same case.

National Defense Act of 1920, ch. 227, art. 13, 41 Stat. 789. The 1948 provision was:

> For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and one or more assistant trial judge advocates and one or more assistant defense counsel when necessary: *Provided*, That the trial judge advocate and defense counsel of each general court-martial shall, if available, be members of the Judge Advocate General's Department or officers who are members of the bar of a Federal court or of the highest court of a State of the United States: *Provided further*, That in all

before special courts-martial remains a limited one. Appointment of counsel is provided but the quality of representation is contingent upon whether "physical conditions or military exigencies" allow for appointing advocates with legal training.[61]

B. The Sixth Amendment as the Source

The view emphasizing the sixth amendment as the source of the right to military counsel places heavy stress upon the words "all criminal prosecutions" as found therein,[62] making no apparent distinction between military and civilian proceedings. Advocates of the sixth amendment source invoke the principle that constitutional grants of power to any branch of the government must be construed within the framework of the entire Constitution.[63] As expressed by the Court of Appeals of the District of Columbia in *Burns* v. *Lovett:*

> The power of the Congress to make rules for the armed forces is one of a long list . . . of powers conferred . . . upon the Congress. We find no intimation in the Constitution itself that Clause 14 of Section 8 of Article I and proceedings pursuant thereto are exempt from the requirements and prohibitions of the Fifth and Sixth Amendments. We think those Amendments apply to each and all of the powers of the Congress . . . and to all acts of executive officials . . . and to judicial proceedings . . . *except when an exception is stated in the Constitution itself.*[64]

---

cases in which the officer appointed as trial judge advocate shall be a member of the Judge Advocate General's Department, or an officer who is a member of the bar of a Federal court or of the highest court of a State, the officer appointed as defense counsel shall likewise be a member of the Judge Advocate General's Department or an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States: *Provided further,* That when the accused is represented by counsel of his own selection and does not desire the presence of the regularly appointed defense counsel or assistant defense counsel, the latter may be excused by the president of the court: *Provided further,* That no person who has acted as member, trial judge advocate, assistant trial judge advocate or investigating officer in any case shall subsequently act in the same case as defense counsel or assistant defense counsel unless expressly requested by the accused: *Provided further,* That no person who has acted as member, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act in the same case as a member of the prosecution: *Provided further,* That no person who has acted as member, trial judge advocate, assistant trial judge advocate, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act as a staff judge advocate to the reviewing or confirming authority upon the same case.

Selective Service Act of 1948, ch. 625, §208, 62 Stat. 629. *See* authority cited at notes 6-7 *supra.*

[61] Military Justice Act, Pub. L. No. 90-632, §827(c) (October 24, 1968).

[62] U.S. CONST. amend. VI.

[63] The basis for that principle stems from the language of the Constitution proclaimed as the "supreme Law of the Land." U.S. CONST. art. VI.

[64] 202 F.2d 335, 341 (D.C. Cir. 1952) (emphasis added). Support for this view was expressed by Justices Minton, Douglas, and Black in the Supreme Court decision of *Burns* discussed at note 70 *infra.* A similar expression of the universal application of the sixth amendment was stated by the Supreme Court in Gideon v. Wainwright, 372 U.S. 335 (1963), wherein the Court conclusively established the fundamental character of the right to counsel.

The sixth amendment proponents question the autonomy attributed to the aforementioned article I power which insulates the disciplinary proceedings of the military from the general procedural due process limitations. They urge, instead, that the purpose of that congressional power is to provide for national defense[65] and that the power to discipline military personnel under article I is merely incidental to that purpose. Thus, where procedural due process of a military defendant is involved, the constitutional safeguards of the accused's rights will prevail over the national defense purpose embodied in article I.[66] Discussing this interpretation of article I, the Supreme Court recently held:

> That provision itself does not empower Congress to deprive people of trials under Bill of Rights safeguards, and we are not willing to hold that power to circumvent those safeguards should be inferred through the Necessary and Proper Clause.
>
> . . . .
>
> There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution.[67]

Concomitant with the above sixth amendment approach, the "liberal" view of habeas corpus follows as a corollary to implement the rights of military personnel by providing broader criterion to review such matters.[68] One habeas court has stated with regard to the availability of collateral review:

> [Although] military law provides its own distinctive procedure to which the members of the armed forces must submit . . . the due process clause guarantees to them that this military procedure will be applied to them in a fundamentally fair way.[69]

The foregoing reveals two distinct theories of the federal judiciary when faced with questions regarding collateral review of military proceedings and the right to military coun-

---

[65] See Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181 (1962). The Chief Justice viewed the constitutional dilemma in terms of these two competing claims: (1) the safeguard of freedom from military encroachment, by a separate military establishment always *subordinate* to civil authority, as opposed to (2) military defense as a necessity for national survival. In this regard, he stated:

> On the whole, it seems to me plain that the Court has viewed the separation and subordination of the military establishment as a compelling principle. When this principle supports an assertion of substantial violation of a precept of the Bill of Rights, a most extraordinary showing of military necessity in the defense of the Nation has been required for the Court to conclude that the challenged action in fact squared with the injunctions of the Constitution.

Id. at 197. *See also* Reid v. Covert, 354 U.S. 1 (1956).

[66] United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

[67] *Id.* at 21-22. Thus, the Court stated that the implied power to adjudicate is merely "incidental to an army's primary fighting function." *Id.* at 17.

[68] Gibbs v. Blackwell, 354 F.2d 469 (5th Cir. 1965).

[69] United States *ex rel.* Innes v. Hiatt, 141 F.2d 664, 666 (3d Cir. 1944); *see also* Shapiro v. United States, 69 F. Supp. 205, 207 (Ct. Cl. 1947).

sel.[70] One line of authority advocates limited review of military decisions while declaring that article I is the autonomous source by which Congress may guide itself in declaring the extent of legal representation afforded a military accused. This conservative posture is embedded in the theory of a separate legal system for the military community. On the other hand, the second line of authority argues for broad review of military decisions

[70] Both theories found expression within the United States Supreme Court in Burns v. Wilson, 346 U.S. 137 (1952), where the petitioners, by means of habeas corpus, contended they had been denied due process, *inter alia*, because of a denial of counsel at their general court-martial proceeding. The Court affirmed a dismissal of petitioner's application for habeas corpus review.

Speaking for the majority, Chief Justice Vinson reiterated the "strict" view of habeas corpus review of military convictions, and the doctrine of a separate jurisprudence for military law, "separate and apart from the law which governs our federal judicial establishment." *Id.* at 139-40. Justice Minton concurred upon these same theories. *Id.* at 147.

However, the Chief Justice qualified his perspective by commenting upon constitutional freedoms, by stating in dictum:

> The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights. In military habeas corpus cases, even more than in state habeas corpus cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings — of the fair determination of the military tribunals after all military remedies have been exhausted. Congress has provided that these determinations are 'final' and 'binding' upon all courts . . . . But these provisions do mean that when a military decision has dealt *fully and fairly* with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence.

Id. at 142 (emphasis added). This apparent conflict in the theories adopted by the Chief Justice was not resolved, since he denied a *de novo* hearing to the petitioners because of the assumption that errors involving the accused's due process rights would be corrected by review in the military appellate courts. *See* textual discussion beginning at note 83 *infra*.

On the other hand, Justice Frankfurter voiced opposition to "any *a priori* or technical notions of [appellate] 'jurisdiction'", 346 U.S. at 148, contending that the protection of due process was of paramount importance "no matter under what authority of Government it was brought about." *Id.* at 148-49. In a separate opinion urging reargument, while acknowledging that the *Zerbst* standard had never been applied in military habeas corpus, he said:

> But if denial of the right to counsel makes a civil body legally nonexistent, *i.e.*, without 'jurisdiction,' so as to authorize habeas corpus, by what process of reasoning can a military body denying such right to counsel fail to be equally nonexistent legally speaking, *i.e.*, without 'jurisdiction,' so as to authorize habeas corpus? Again, if a denial of due process deprives a civil body of 'jurisdiction,' is not a military body equally without 'jurisdiction' when it makes such a denial, whatever the requirements of due process in the particular circumstances may be?

Id. at 848.

The dissenting opinion of Justice Douglas, joined by Justice Black, adopted the views of Justice Frankfurter. Thus, the dissenters recognized that certain differences existed between civilian and military procedural law. But the dissent qualified the effect of such differences, arguing that the Court had never held that "all the rights covered by the Fifth and the Sixth Amendments were abrogated by Art. I, ..." *Id.* at 152. Furthermore, the dissent considered the military court system as another federal administrative agency, subject to supervision by the federal civilian judiciary in determining whether the military courts had exercised the proper degree of fairness with regard to the principles of constitutional due process. *Id.* at 154.

by habeas corpus to protect the military accused's sixth amendment right to counsel. This liberal approach towards the right of military representation and its habeas corpus protection is supported by the principle that congressional grants of power must be construed within the context of the entire Constitution and as a necessary safeguard, be subject to a broad scope of civilian review. The polarity of these two views exists more in their abstraction than in their application.

MILITARY DUE PROCESS

Advocates of each theory agree that a separate military jurisprudence exists, especially as concerns the area of substantive law.[71] However, advocates of the sixth amendment approach contend this separation does not extend to matters of procedural due process of the military accused. The proponents of article I would contend that while there are procedural protections within the military judicial system, they originate as a matter of legislative grace rather than constitutional compulsion. Thus, the advocates of article I recognize the existence of a matrix of procedural rights available to the military accused but differ as to its source. This matrix has been characterized as "military due process."

The concept of "military due process" is a corollary of the premise that separate legal systems exist for the civilian and military communities. Despite the theoretical divergence with proponents of the Bill of Rights as to source, advocates of the article I theory have nevertheless conceded that both civilian and military procedural safeguards should attain a common result in their application. Thus, the first court to recognize the concept of "military due process" by name, interpreted the UCMJ as expressing Congress' intent that the procedural safeguards under that legislation be coextensive with those afforded to civilians under constitutional due process, stating:

> There are certain standards . . . which have been specifically set by Congress and which we must demand be observed in the trials of military offenses. . . . We conceive these rights to mold into a pattern similar to that developed in federal civilian cases. For lack of a more descriptive phrase, we label the pattern as "military due process" and then point up the minimum standards which are the framework for this concept and which must be met before the accused can be legally convicted. . . .
> . . . For our purposes, and in keeping with the principles of military justice developed over the years, *we do not bottom those rights and privileges on the Constitution. We base them on the laws as enacted by Congress.* But, this does not mean that we cannot give

[71] For example, agreement would center upon the delineation of military substantive crimes, i.e. desertion, to accommodate particular needs of the armed forces.

> the same legal effect to the rights granted by Congress to military personnel as do civilian courts to those granted to civilians by the Constitution or by other federal statutes.
> . . . [W]e believe Congress intended, in so far as reasonably possible, to place military justice on the same plane as civilian justice, and to free those accused by the military from certain vices which infested the old system.
> . . . .
> . . . [I]f the denial of these benefits to a defendant is of sufficient importance to justify a civilian court in holding that it denied him due process, it should be apparent to a casual reader that denial of a similar right granted by Congress to an accused in the military service constitutes a violation of military due process. By adopting these principles we impose upon military courts the duty of jealously safeguarding those rights which Congress has decreed are an integral part of military due process.[72]

The above statement suggests that despite the autonomy attributed to article I, the exercise of that power is tempered by congressional intent as judicially interpreted. Chief Justice Quinn of the Court of Military Appeals characterized this modification process as an inescapable principle of interpretation of military procedural rights: "Part of our heritage of freedom is the complex of basic rights embraced within constitutional due process. *Those same rights are inseparably interwoven in due process of military law.*"[73]

The interpretation in support of the similarity of "military due process" to the civilian standard has been implemented by military tribunals declaring that the military defendant is entitled to the benefit of such rights as confrontation of witnesses,[74] freedom from illegal search and seizure,[75] and freedom from self-incrimination.[76] Significantly, the right to legally trained counsel at general courts-martial has been provided. However, due process similarity ceases in the case of special courts-martial where the right to counsel under the UCMJ allows the appointment of "equally skilled" laymen, while such representation would violate due process in a civilian trial.[77]

This dissimilarity of legal representation significantly effects the accused's rights in view of the fact that special courts-

---

[72] United States v. Clay, 1 U.S.C.M.A. 74, 77, 79, 1 C.M.R. 74, 77, 79 (1951) (emphasis added).

[73] Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225, 254 (1961) (emphasis added). Chief Justice Quinn argues that the UCMJ requirements, with relation to procedural due process, proceed beyond established civilian standards. With regard to the right to counsel, this assertion is acceptable for the general court-martial, but is questionable in special court-martial situations, in view of the military standard of "counsel" permitted to advocate in the latter case. *See* text at notes 6-8 *supra*.

[74] United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1953) (dissenting opinion of Chief Justice Quinn).

[75] United States v. Brown, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959).

[76] United States v. Welch, 1 U.S.C.M.A. 402, 3 C.M.R. 136 (1952).

[77] *See* authority cited at notes 6-7 *supra*.

martial have jurisdiction[78] over capital offenses, crimes that would be considered felonies in the civilian system, and, until very recently, bad-conduct discharges under special circumstances.[79] In each of these instances the appointed counsel may be called upon to interpret sophisticated legal concepts and complex factual situations.[80] The approbation for such practice arises from the fallacious belief that any officer has sufficient training to perform as adequate defense counsel. In criticism of this situation, the Board of Review of Military Appeals has recommended:

> [I]n the trial of a case . . . where complex legal problems are almost sure to develop [as in interpreting a state statute and the meaning of constructive taking] . . . the convening authority should, whenever practicable, appoint lawyers to serve in the above named capacities whenever trial is to be had by special court-martial. Failure to do so is potential of serious prejudice.[81]

This comment suggests that the full benefits of "military due process" apply only in certain situations to be determined by the convening authority.[82] However, the determination of whether a particular case is of the complex nature requiring legal expertise must be made by either legally or non-legally trained personnel. The very nature of the determination to be made would, logically, seem to preclude the latter. And, once trained legal counsel have familiarized themselves with the facts and problems of a case to make this determination, such person should participate as well in the adjudicative portion of the military proceeding.[83]

---

[78] *See* authority cited at note 1 *supra*. The provision for capital offenses prosecuted at special court-martial is utilized during wartime. *See, e.g., In re* Yamashita, 327 U.S. 1 (1946), where a military commission acting under presidential regulation tried an enemy officer, under practices which seem to deny procedural due process.

[79] *See* authority cited at note 22 *supra*.

[80] *See, e.g.*, United States v. Gardner, 9 U.S.C.M.A. 48, 25 C.M.R. 310 (1958), where an accused's untrained counsel, by direct examination of the defendant, convicted his own client of one charge of larceny; Hicks v. Hiatt, 64 F. Supp. 238 (M.D. Pa. 1946), where untrained counsel failed to introduce evidence of a rape victim's previous unchastity, as unimportant to the defendant's case.

[81] United States v. Forbes, 3 C.M.R. 399 (1951). A similar recommendation was expressed with regard to the disability of punishment from a special court-martial, to the end that effective legal assistance should be afforded to the military accused. United States v. Culp, 14 U.S.C.M.A. 199, 216, 33 C.M.R. 411, 428 (1963).

[82] In most cases, where complex legal problems are to be resolved, the convening authority of a special court-martial is usually a commanding officer, 10 U.S.C. §823 (1964), who may not have any legal background upon which to base his conclusion. This same officer will also control the appointment of counsel for the accused at special court-martial, pursuant to article 27(c), 10 U.S.C. §827(c) (1964).

[83] This view has been recognized in two decisions of "military due process" courts, concerning both general and special court-martial. Both cases held that the appointed representative of the military accused must be capable of giving *effective* legal assistance by acknowledging the fundamental character of the right to counsel. United States v. Kraskoukas, 9 U.S.C.M.A. 607, 26 C.M.R. 387 (1958) (general court-martial); United States v. Mathis, 6 C.M.R. 661 (1952) (special court-martial).

Finally, advocates of article I contend that any dissimilarity between civilian and "military due process" is remedied through military appellate review.[84] This conclusion assumes that questions of due process will be presented to the appellate tribunal. However, issues concerning the fairness of special court-martial proceedings may never reach the military reviewing courts, due to the inability of the accused's legally untrained counsel to recognize the deprivation of procedural safeguards. On the other hand, the appointment of "equally skilled" laymen at special courts-martial frequently serves as the catalyst for creating due process questions that continually perplex the military appellate tribunals.[85] Consequently, the basis for the appointment and

---

[84] Indeed, Chief Justice Vinson placed great emphasis upon the available military appellate procedures in the case of Burns v. Wilson, 346 U.S. 137 (1952) discussed at note 70 *supra.*

Military review of all court-martial proceedings begins with a mandatory examination by the convening authority who initially ordered the proceeding. 10 U.S.C. §860 (1964). The convening authority has a choice in disposing of the record: he may order a rehearing, 10 U.S.C. §§862-63 (1964) or approve the findings and sentence of the court-martial, 10 U.S.C. §864 (1964), either in part or all of the record.

After disposition by the convening authority, the entire record must be sent to the appropriate Judge Advocate General, and in the case of a bad-conduct discharge from a special court-martial, the record is sent to the officer who normally reviews general court-martial proceedings, or directly for review by the board of review (now called the Court of Military Review, due to the Military Justice Act. Pub. L. No. 90-632, §866 (October 24, 1968)). All other records of special or summary courts-martial are reviewed by a judge advocate or his equivalent in the other branches of the services. 10 U.S.C. §865 (1964).

The next step is a hearing before the Court of Military Review, which examines the record with respect to findings and sentence as approved by the convening authority. Reference to the Court of Military Review by the Judge Advocate General is mandatory for all cases dealing with sentences of death, dismissal of a commissioned officer, dishonorable or bad-conduct discharges, or sentences of confinement of one year or more. All other cases are within discretionary power as to review at this stage. Military Justice Act. Pub. L. No. 90-632, §866 (October 24, 1968).

After disposition by the Court of Military Review, the accused may pursue appellate remedies to the Court of Military Appeals, 10 U.S.C. §867 (1964), a federal appointive agency under the Department of Defense. Review is granted upon cases involving general or flag officers, appeals sent by the Judge Advocate General, and cases based upon an accused's petition requiring proof of good cause for review.

These procedures are very comprehensive, yet it is suggested that the denial of due process by failure to supply adequate assistance to the accused at special court-martial will prohibit the preservation of issues for review, while at the same time formulating many more issues due to the counsel's inadequacy. Both problems could easily be resolved by appointment of qualified counsel at the trial stage.

The federal courts have recognized the utility of these military appellate procedures by abstaining from collateral review whenever practicable. Thus, in Gusik v. Schilder, 340 U.S. 128 (1950), the Supreme Court sustained the refusal to issue a writ of habeas corpus where the military accused had not exhausted all military remedies before seeking collateral review in the federal courts, despite the fact that the remedy available to the petitioner had not been at his disposal when he originally obtained habeas corpus review at the district court level. *Accord, In re* Varney's Petition, 141 F. Supp. 190 (S.D. Cal. 1956). *Contra,* United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

[85] *E.g.,* United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963); United States v. Kraskoukas, 9 U.S.C.M.A. 607, 26 C.M.R. 387 (1958);

the effectiveness of counsel are continually challenged in military proceedings, while the civilian standard of effective legal representation is so concretely established that requisites of skill are no longer questioned.[86]

Thus, despite the pronouncements of the "military due process" courts to the contrary, the application of that concept with regard to counsel at special court-martial does not attain the same result which constitutional due process has achieved in civilian courts. It is suggested this disparity results from a balancing process with regard to matters of convenience within the military community. Weighing the military's needs against the due process rights afforded an accused occurs regardless of whether the source of military procedural safeguards is the article I or the sixth amendment theory. The product of this process, as illustrated by the *Kennedy* and *Stapley* decisions,[87] depends upon the degree of importance attributed to "military necessity."

MILITARY NECESSITY

The argument of "military necessity" is founded upon the importance of national defense that necessitates the maintenance of a large standing armed force. In order for the military community to function properly, the personnel must be obedient and loyal throughout the chain of command. Incidental to this required discipline, a judicial system has been created by virtue of legislative enactments under article I. However, despite the inevitable growth of the military establishment, and, the concomitant increase of litigation to maintain discipline, the military legal staff has not grown with that of the armed forces.[88]

United States v. Gardner, 9 U.S.C.M.A. 48, 25 C.M.R. 310 (1958); United States v. Mathis, 6 C.M.R. 661 (1952); United States v. Forbes, 3 C.M.R. 399 (1951). *Compare* United States v. Self, 13 C.M.R. 227 (1953) *and* United States v. Best, 6 U.S.C.M.A. 39, 19 C.M.R. 165 (1955) *with* Glasser v. United States, 315 U.S. 60 (1942). *See also* Wilson, *The Rights of the Accused of Effective Counsel: The Military View*, 14 KAN. L. REV. 593 (1966). The number of cases challenging military counsel may be explained because construction of a statute dealing with a constitutional guarantee is involved, while civilian proceedings presenting a right to counsel issue deal with a direct constitutional interpretation.

[86] *See* authority cited at note 44 *supra.*

[87] *See* text beginning after note 16 *supra.*

[88] For example, the UCMJ was enacted at the time of the Korean conflict. At that time the Army's strength was authorized to increase from 593,000 to 1,263,000 men, while the military legal staff was increased from 669 officers to 1,030. This meant that 361 individuals with some degree of legal training were to complement an influx of 670,000 military personnel. UNITED STATES SECRETARY OF DEFENSE, ANNUAL REPORT OF 1951.

Further contrast is revealed by examining personnel figures for a peace time era. For the period of 1937-38, the total number of Army personnel was 178,108 with 94 members of the Judge Advocate General's Corps for 1937, while at the close of June, 1938 the aggregate had increased to 183,455 while the legal staff numbered 90 individuals. UNITED STATES SECRETARY

Thus, quantitative considerations of supply and demand are responsible for the practice of appointing "equally skilled" legal or non-legal counsel at special courts-martial.[89] Indeed, this mathematical factor is now expressed in the UCMJ provisions for the assistance of counsel.[90] Furthermore, regardless of the availability of legally trained counsel, "military necessity" involves additional considerations which further derogate the rights of a military accused. For example, the amount of command influence[91] exercised by the convening officer's discretion may subjectively affect the counsel appointed at special courts-martial. Consequently, defense counsel may labor under his commander's influence by at least subconsciously favoring "the armed force to which he belongs rather than to the accused whom he represents,"[92] regardless of counsel's qualifications for rendering effective legal assistance.

Considered in the abstract, "military necessity" suggests a judicial system for adjudicating the accused's rights according to the specific needs of the military community. Practically speaking, the question of the right to counsel at special court-martial becomes one of whether that guarantee, either by civilian, sixth amendment standards, or military, article I standards of due process, prescribes that the military resolve this problem of convenience rather than infringing upon those rights otherwise guaranteed to all civilians. It is suggested that "military necessity" must yield to the protection of the individual's due process rights.

That conclusion is justified from the status established for the military in our society. The civilian community has always controlled the military establishment as a subordinate branch of government. As Chief Justice Warren has commented, the argument of "military necessity" competes with that of military subordination to the civilian community with regard to the question of "[w]hether the disputed exercise of the power is compatible with preservation of the freedom intended to be insulated by the Bill of Rights."[93] Furthermore, "military ne-

---

OF WAR, ANNUAL REPORTS OF 1938-41.

More recent figures from fiscal year 1965 reveal that 961,000 Army personnel had counsel from 581 officers, who were available to render professional assistance to the military accused. UNITED STATES SECRETARY OF DEFENSE, ANNUAL REPORT OF 1965.

[89] *See* text at note 8 *supra.*

[90] *See* authority cited at note 6 *supra.*

[91] Hiatt v. Brown, 339 U.S. 103, 108 (1950). The commanding officer is affected by subjective factors which may operate against an accused's rights. For example, the commanding officer is subject to his superior officer's command influence and considerations of discipline for "the good of the military." *See also* United States v. Mathis, 6 C.M.R. 661 (1952).

[92] United States v. Culp, 14 U.S.C.M.A. 199, 220, 33 C.M.R. 411, 432 (1963).

[93] Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 183 (1962). Therefore, regardless of the factual situation or what type of

cessity" has not adjusted to the changing role of the military community, from an independent segment of our nation to that of an integral institution in our civilized society.[94] As the military continues to increase its influence throughout the civilian population, it seems incomprehensible that mere expedience should not justify a difference in the treatment of an accused's procedural rights within the two communities.[95] Indeed, Chief Justice Warren has cautioned that only an extraordinary showing of "military necessity" would be required to justify violating a precept of the Bill of Rights.[96]

Thus, the question of the right to counsel at special court-martial hinges upon the weight attributed to the factor of "military necessity." The line of authority that emphasizes article I as the source of military counsel would be persuaded to modify the interpreted result of "military due process" by the acceptance of "military necessity" as *the controlling consideration* to reach a contrary result from the civilian standard for the right to effective counsel. On the other hand, advocates for the sixth amendment as the source of military legal representation would argue that "military necessity" stands as a factor to be weighed with other considerations for the balancing of interests to determine the fairness of military proceedings. The disparate conclusions reached in *Kennedy* and *Stapley* could be viewed as a reflection of this divergence over the degree of weight attributed to "military necessity."

CONCLUSION

In final analysis, the differences over the reviewability of military decisions by habeas corpus, the nature of due process within the military community, and the source of the right to military counsel at special court-martial all center upon the extent to which necessity dictates compromise. Indeed, the factor of "military necessity" appears to be the rationale behind the theory of a separate military judicial system and di-

---

court had jurisdiction, "[t]hese elemental procedural safeguards were embedded in our Constitution to secure their inviolateness and sanctity against the passing demands of expediency or convenience." Reid v. Covert, 354 U.S. 1, 10 (1956). The Military Court of Appeals has itself expressed a similar attitude, commenting upon the right against self-incrimination: "The right here violated flows, through Congressional enactment, from the Constitution . . . . Military due process requires that courts-martial be conducted not in violation of these constitutional safeguards . . . ." United States v. Welch, 1 U.S.C.M.A. 402, 408, 3 C.M.R. 136, 142 (1952).

[94] Sutherland, *The Constitution, The Civilian and Military Justice*, 35 ST. JOHN'S L. REV. 215 (1961).

[95] 4 HOUSTON L. REV. 126 (1961), where the argument is made that influence of the military upon increasing numbers necessitates jealously guarding constitutional rights, regardless of an individual's civilian or military status.

[96] Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 195, 197 (1962).

vides the federal civilian courts over collateral review of military adjudication and the procedural rights of the military accused.

Thus, the division is a consequence of the relative weight given to "military necessity" by judicial interpretation. Under the article I theory necessity is accorded equal weight with considerations of fairness and due process rights, while sixth amendment theorists weigh "military necessity" as only one of many variables acting upon the right to counsel at special court-martial.

It is submitted that the article I advocates have rendered disproportionate weight to the necessity prevalent in the military community. The error in the application of "military necessity" is evident if one accepts the article I proponent's interpretation of "military due process" as expressing similar safeguards to that of civilian due process. Thus, if the UCMJ provisions are intended to attain civilian standards of fairness, then the emphasis given to the factor of necessity must be subordinated to the degree attributed to the sixth amendment line of authority. Once the relative weight of "military necessity" is equated to the degree that is acknowledged for constitutional due process, it follows that the appointment of counsel at special court-martial proceedings would require the establishment of effective, legally trained counsel to represent the military accused.

Richard J. Loeffler